

AO 243 (Rev. 5/85)

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District	2005 JAN 31 PM 2:33 District of Puerto Rico
Name of Movant Jose Olivo Rivera		Prisoner No.	05136-069 CLERK'S OFFICE DISTRICT COURT 99-00344(PG) SAN JUAN, P.R.
Place of Confinement FCC Coleman Medium, P.O. Box 1032, Coleman, Florida 33521-1032			
UNITED STATES OF AMERICA		V.	JOSE OLIVO RIVERA (name under which convicted)

MOTION

- Name and location of court which entered the judgment of conviction under attack United States District Court, For The District of Puerto Rico
- Date of judgment of conviction August 24, 2001
- Length of sentence One Hundred Fifty One (151) Months
- Nature of offense involved (all counts) Count One (1) : Conspiracy to distribute cocaine, heroin and marijuana

5. What was your plea? (Check one)

(a) Not guilty ☐

(b) Guilty ☒

(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury ☐

(b) Judge only ☐

7. Did you testify at the trial?
Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?
Yes ☒ No ☐

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SAN JUAN, P.R.

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9. If you did appeal, answer the following:

(a) Name of court United States Court of Appeals For The First Circuit

(b) Result Judgement From The District Court Was AFFIRMED

(c) Date of result October 16, 2003

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
Yes ☐ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

- (5) Result.

(6) Date of result

- (1) First petition, etc. Yes ☐ No ☐

- (2) Second petition, etc. Yes ☐ No ☐

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- This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

- CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty, which was based on a confession that was not voluntary, knowing, and intelligent.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.

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- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: Trial Court Violated The Defendant's United States Constitutional Fifth and Sixth Amendment Rights and Imposed An Illegal Sentence

Supporting FACTS (state *briefly* without citing cases or law) Trial Court applied facts not admitted, found by a jury, or proved beyond a reasonable doubt to enhance Rivera's sentence by U.S.S.G. §4B1.1 (career offender) provision. In turn imposing an illegal sentence. Pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 124 S.Ct. 2531 (2004); *United States v. Booker*, No. 04-104, Argued October 4, 2004-Decided January 12, 2005.

B. Ground two: Trial Court Violated The Defendant's United States Constitutional Fifth Amendment Right of Due Process

Supporting FACTS (state *briefly* without citing cases or law): Trial court did not give defendant fair notice of the career offender provisions under U.S.S.G. § 4B1.1 during the plea hearing or Rule 11(e) procedure.

C. Ground three: Trial Court Breached Defendant's and Government's Plea Agreement. Violating Defendant's Due Process Right under the 5th Amendment

Supporting FACTS (state *briefly* without citing cases or law): The plea agreement stated a sentence within 46-57 months, and the court imposed a sentence of 151 months.

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D. Ground four: Defendant Was Denied Effective Assistance Of Counsel

Supporting FACTS (state *briefly* without citing cases or law): Trial counsel failed to object to the breach of plea during sentencing, and also failed to object to the findings of facts under a Fifth and Sixth Amendment objection, of the facts used to increase defendant's punishment beyond the prescribed agreed range of 47-57 months as stated in the plea agreement.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Carlos R. Noriega, Esq., Banco Cooperativo Plaza, 623 Ponce De Leon Avenue, Suite 310, Hato Rey, Puerto Rico 00917

(b) At arraignment and plea Same

(c) At trial Same

(d) At sentencing Same

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(e) On appeal Jorge E. Rivera-Ortiz, Esq., P.O. Box 1845, Manati, Puerto Rico
00674-1845

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on
January 12, 2005
(date)

Jorge A. Rivera-Ortiz
Signature of Movant

NOTICE OF FILING

The instant Motion To Vacate under 28 U.S.C. §2255 is timely filed from within one year from January 14, 2004 (90 days from denial of appeal October 16, 2003, in which to file Writ of Certiorari), by being deposited in the institutional "**Legal Mail Box**" on this 12th day of January 2005. Mail box rule. Pursuant to Houston v. Lack, 487 U.S. 266 (1989).

January 12, 2005

Respectfully Submitted By,

Jose A. Olivo Rivera
Jose Olivo Rivera, pro se.

Reg. No. 05136-069 B4

FCC Coleman Medium

P.O. Box 1032

Coleman, Florida

33521-1032

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to AUSAs Jorge E. Vega-Pacheco and Nelson J. Perez-Sosa, Torres Chardon Building, Suite 1201, 350 Carlos Chardon Avenue, Hato Rey, Puerto Rico 00918 on this 12th day of January 2005.

Jose A. Olivo Rivera
Jose Olivo Rivera, pro se.